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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (S.D.N.Y., Murphy, *D.J.*, R. 93-94) does not appear in the Official Reporter. The opinions of the Court of Appeals (R. 94-108) are reported in 245 F. (2d) 175. Petition for rehearing was denied by the Court of Appeals without written opinion (R. 109).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered May 21, 1957 (R. 108-109). The petition for a Writ of Certiorari was filed on September 23, 1957 and granted on December 16, 1957 (R. 110).

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Second Circuit is provided by Sections 1254(1) and 2101(c) of Title 28, U.S. Code.

Statement of the Case

On November 24, 1948, about noon, Kermarec accompanied by Henry Yves, a member of the crew, boarded the S.S. Oregon while berthed in the North River at New York City (R. 46-48). In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer of the vessel specifically authorizing Kermarec's visit (R. 20, 46). Yves retained the pass and it was neither shown, read nor explained to Kermarec (R. 48). The visit, concededly, was personal and social (R. 8).

Petitioner remained on the vessel until 4:00 or 5:00 p.m. While leaving the vessel under the guidance of Yves, petitioner began to descend a 12-14 step crew and passenger stairway covered with a continuous white canvas runner about 1/8" thick (R. 11, 12, 15, 57, 69, 73, 90, 91). The stairs appeared "normal" and "looked alright all the way down" (R. 12, 24). Holding on to the handrail, Kermarec continued his descent without any mishap until he reached the fourth step from the bottom. At this point the canvas, suddenly slipped from under his foot and he was precipitated to the bottom of the stairway striking his right hip (R. 12). While lying at the bottom of the stairway, petitioner saw the canvas hanging off the ledge of the step (R. 13, 26).

The canvas had been fastened to the step by Bourdon, a ship's porter, as part of his regular duty to clean and cover the stairway upon arrival in port (R. 53, 55, 56, 57). The only instruction received from the Chief Steward, his

superior officer, was that "the canvas cover must be tight, that you don't have any trouble with it" (R. 66). The vessel had arrived in port the day preceding the accident (R. 55). After the passengers had left, Bourdon cleaned the stairs and laid the canvas runner (R. 55, 56). On the following day, the day of the accident, at 8:00 a.m., less than 24 hours after he had first cleaned the stairs, he had to pick up the canvas a second time, clean the steps and reset the canvas because they were "not quite clean, somewhat dirty, from the crew of the ship" (R. 56). The picking up and laying down of the canvas runner was "routine" and involved "always the same kind of work" (R. 56). The canvas was fastened by means of two small carpet tacks, one on each side of the canvas to the front edge of the steps (R. 58).[1] Nothing held the canvas to the rear of the step or up the riser to the step above (R. 60). The lifting and removal of the canvas runner could be done quickly. The tacks were pulled out by hand alone. As Bourdon put it, "It is not hard at all, you just get hold of the canvas and then the tacks come out by themselves" (R. 32, 60).

As a result of his fall, petitioner sustained a fracture of the right femur with displacement and shortening. He was hospitalized from November 24, 1948 until February 12, 1949, and was disabled from work until October 16, 1949. There was no dispute during the trial as to the injury, loss of wages, hospital or medical expenses (R. 79).

The case was tried twice, before the same Judge and two different juries. The first jury disagreed and the Court denied respondent's motion to dismiss the complaint after discharging the jury. At the end of the second trial, the jury rendered a verdict for the petitioner in the sum of

[1] The size of the tack is indicated by Bourdon's own drawing (R. 89, Plaintiff's Exhibit 5). The typical location of the two tacks in each step is shown by Bourdon's two crosses on the top step of the stairway photograph (R. 90, Defendant's Exhibit C).

$7500. The Court thereupon granted respondent's motions to set aside the verdict and dismiss the complaint (R. 2).

The trial judge charged the jury that petitioner was a "gratuitous" and "bare" licensee and that the law of the forum, i.e., New York, applied; pursuant to which plaintiff could recover only if the jury found that the respondent knew of the unsafe condition created by the canvas and failed to correct it or warn the petitioner about it (R. 74, 79, 93). He refused to charge that petitioner's accident was a maritime tort, and accordingly, refused to apply the federal maritime doctrines of comparative negligence and unseaworthiness (R. 74, 77, Transcript of Proceedings Below, pp. 99, 220). In his opinion setting aside the verdict and dismissing the complaint, Judge Murphy conceded that "there was evidence as to the size of the tacks and * * * that they could be removed easily." He nevertheless found that there was a "complete failure of proof" that the respondent "had actual knowledge of the dangerous condition" or that such knowledge could be imputed to the respondent because its servants had used tacks inadequate for the purpose" (R. 93, 94, 96).[2]

Circuit Judge Lumbard speaking for the majority of the Court conceded that "evidence was adduced at trial from which a jury could find" that the canvas was fastened to each step by two tacks only; that these could be removed simply by taking hold of the canvas, and that Kermarec had sustained his injury when the canvas had slipped under his foot. The Court of Appeals, nevertheless, affirmed the dismissal below and sustained the trial Court on its interpretation of the applicable law (R. 95-100).

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[2] Since the jury verdict was in plaintiff's favor, the Court's refusal to apply the principle of comparative negligence was not prejudicial. However, the failure to apply the doctrine of unseaworthiness was prejudicial, since it would have obviated the proof of knowledge which, according to the Court, petitioner had failed to prove.

The sharp dissent of Chief Judge Clark sets forth substantially the basis for this appeal (R. 100-108).

Questions Presented

1. Whether a shipboard injury, in navigable waters, to an authorized guest of a crew member, due to a defectively affixed stairway canvas runner, constitutes a maritime tort requiring the exclusive application of federal maritime law?

2. Assuming the applicability of federal maritime law, was respondent under a duty to the petitioner to provide a seaworthy vessel? Did the Courts below err in refusing to apply the doctrine of unseaworthiness?

3. Assuming the applicability of federal maritime law, the doctrine of unseaworthiness aside, what was the scope of the duty owed to the petitioner to determine whether respondent was negligent?

(a) Should federal maritime law require from the shipowner a single standard of care for all authorized visitors aboard the vessel—or does it adopt the common law distinction between licensee and invitee?

(b) Assuming that the federal maritime law perpetuates the common law distinction between licensee and invitee, did the Courts below err in refusing to hold that petitioner was an invitee?

(c) Assuming that the Courts below properly found that petitioner was a licensee, was there sufficient evidence to support the verdict for the petitioner under the charge which the Trial Court gave to the jury? Do the decisions of the Courts below constitute improper interference with the jury verdict?

Summary of Argument

I—The basis of this action is a maritime tort and federal maritime law, not state or common law, should apply. The Trial Court, therefore, erred in refusing to apply the doctrines of comparative negligence and unseaworthiness. It also indicated confusion as to the admiralty jurisdiction of the Court on the civil side. *Pope & Talbott v. Hawn*, 346 U.S. 706 resolved these issues, but the District Court refused to follow, and the majority of the Court of Appeals failed to correct. Hence, the need for a definitive adjudication as to the definition of a maritime tort and the applicability of federal maritime law on the civil side of the Court, whether or not diversity is present where maritime tort is involved.

II—The application of the doctrine of unseaworthiness has resulted in decisional conflict and confusion. The majority and minority opinions below reflect two divergent views: The restrictive "ship's work" theory which would limit the doctrine only to those doing work essentially of a seaman's nature; the more liberal approach which would extend the doctrine to all lawfully present shipboard visitors. The issue is before this Court for the first time. The majority below erred in refusing to apply the doctrine to licensees. This Court should not now engraft upon the federal maritime law the repudiated common law categories of invitee and licensee (Point III, A). For the same reason, it should not now similarly burden the doctrine of unseaworthiness.

III—Whether found to be an invitee or licensee, respondent was negligent.

A—This Court has never definitively decided whether the rigid common law categories of invitee and licensee are part of the federal maritime law. Under its unique, constitutionally vested, judicial lawmaking powers to declare the maritime law, this Court may refuse to accept this concept as it previously refused to accept the doctrine of contributory negligence. Both are harsh rules incompatible with modern admiralty policy. The English Occupiers' Liability Act of 1957 has done away with the distinction between invitee and licensee in favor of a single standard of due care. This Court should act similarly in furtherance of a progressive maritime law.

B—If the federal maritime law does recognize the distinction between invitee and licensee, petitioner was in fact an invitee to whom respondent owed a duty of reasonable care. The development of this point is essentially the same as in the dissenting opinion. There is no body of precedent that a social guest of a seaman is a licensee. Kermarec's presence on the vessel satisfies both the "invitation" and "economic benefit" criteria in determining his status as an invitee.

C—Even if petitioner is held to be a licensee, respondent breached its duty. There was ample evidence of a dangerous condition. The Courts below palpably erred when they limited their finding solely to the inadequacy of the carpet tacks. Respondent is chargeable with knowledge of the condition of the stairway because Bourdon, its employee, created the condition in the regular course of his employment. Respondent's liability can, therefore, be predicated either upon the "negligent activity" or "condition of the prem-

ises" theories. There was evidence to support the jury verdict. Setting it aside was an improper interference with the jury function. The verdict should be reinstated.

ARGUMENT

I.

The Basis of This Action Is a Maritime Tort Requiring the Exclusive Application of Federal Maritime Law. The Application of New York Law Was Therefore Error.

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202, should have resolved any residual doubt as to (a) what constituted a maritime tort; (b) the "necessary dominance" of the general maritime law doctrines of comparative negligence and unseaworthiness over any contrary state law, where a maritime tort was involved[3] and (c) the applicability of these admiralty principles notwithstanding that jurisdiction was based on diversity and that the case was brought on the law side of the Court to be tried before a jury.[4]

Yet, in the case at bar, the Trial Court refused to find that the subject matter of Kermarec's action was a maritime tort. Accordingly, it refused to apply the principles of comparative negligence and unseaworthiness, and it

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[3] The terms "federal" and "general" maritime law are used synonymously and refer to those "• • • federal maritime policies • • • (and) substantial admiralty rights as defined in controlling Acts of Congress or by interpretative decisions of this Court." *Pope & Talbot, Inc.* v. *Hawn, supra*, p. 410. See also *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36, 40, 63 S.Ct. 488, 490; *The Lottawanna*, 88 U.S. 558.

[4] See also, *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 391, 44 S.Ct. 391, 395, and *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 88-89, 66 S.Ct. 872, 874.

expressed uncertainty as to whether petitioner's right to invoke these principles was not otherwise forfeited because the suit was tried to a jury on the law side of the Court. Because of these misconceptions, the Court felt obliged to apply the law of New York (R. 74-77).

The majority of the Court of Appeals, except for its specific ruling on the issue of unseaworthiness, did not deem it necessary to correct these errors. Thus it remained silent as to whether a maritime tort was here involved; whether it was non-prejudicial error to have applied the New York law of absolute contributory negligence, and it expressed no opinion as to whether admiralty principles could be invoked only on the admiralty side of the Court. Nor is it clear from the opinion, moreover, whether its affirmance that petitioner was a licensee who had failed to prove respondent's actual knowledge of a dangerous condition, was based on its interpretation of New York law, or, whether it was declaring this to be the applicable federal maritime law principle.

A definitive resolution of these issues is urgently needed for several reasons. Any lingering uncertainty at this late date as to what constitutes a maritime tort and whether in a case involving such tort the federal maritime law must be applied, whether on the law or admiralty side of the Court, will result only in needless error and unnecessary appellate litigation. In this connection we respectfully submit that in the interest of maximum certainty and uniformity in the application of admiralty doctrine, this Court should no longer withhold its judgment as to whether diversity of citizenship is essential to the jurisdiction of a District Court to try a maritime tort which does not involve a federal statute.[5] Finally, as we shall show at a later

[5] "In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, as arising 'under the Constitution, laws or treaties of the

point, this Court now has the opportunity, in its discretion, to eliminate the confusion-ridden doctrine of "invitee" and "licensee" and to adopt as part of the general maritime law a single standard of care for all lawfully present persons who are injured as a result of a maritime tort.

Kermarec's complaint necessarily invoked the admiralty and maritime jurisdiction of the District Court and tendered a maritime tort for adjudication. He was injured on an ocean-going vessel; the vessel was in navigable waters; a member of the crew, in a foreign port, had requested and obtained permission for Kermarec to visit him. The accident was attributed to a defectively affixed and maintained ship's appurtenance, i.e., a canvas runner fastened to a ship's stairway to keep it clean between voyages pending the embarkation of the ship's passengers. The complaint sounded in negligence and unseaworthiness.

That the vessel was within New York waters and was not in actual navigation at the time of the accident are not controlling considerations. Nor is it necessary in this case, though otherwise desirable, to determine "whether location in navigable waters was alone sufficient to make a tort 'maritime' or whether further nautical flavor was required."[6] Under either test, the subject matter of petitioner's suit constituted a maritime tort. *Leathers* v. *Blessing*, 105 U.S. 626; *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 34 S.Ct. 733; *Pope & Talbot Inc.* v. *Hawn, supra*, p. 409.

If petitioner's suit does in fact involve a maritime tort, extended discussion should be unnecessary to establish

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United States.' See *Doucette* v. *Vincent*, 1 Cir., 194 F.2d 834 and *Jansson* v. *Swedish American Lines*, 1 Cir., 185 F.2d 212, 30 A.L.R. 2d 1385. *Cf. Jordine* v. *Walling*, 3 Cir., 185 F.2d 662." *Pope & Talbot, Inc.* v. *Hawn, supra*, p. 410, ftn. 4.

[6] *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir., 245 F.2d 175, 180.

the ancillary principle that such tort is to be adjudicated solely by reference to federal maritime law and not by application of the forum state law. "The complaint * * * shows that the claim rests on a maritime tort which under the Constitution is subject to dominant control of the Federal Government."[7] "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law."[8] "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling Acts of Congress or by interpretive decisions of this Court."[9] This is not in derogation of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * * So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."[10]

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[7] *Pope & Talbot Inc.* v. *Hawn, supra*, p. 410 ftn. 4.

[8] *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 250.

[9] *Pope & Talbot Inc.* v. *Hawn, supra*, pp. 409-410.

[10] *Garrett* v. *Moore-McCormack Co., supra*, p. 245.

II.

Since a Maritime Tort Is Present and Federal Maritime Law Is Applicable, Respondent Was Under a Duty to Provide Petitioner With a Seaworthy Vessel. The Courts Below Erred in Refusing to Apply the Doctrine of Unseaworthiness.

The shipowner's absolute duty to provide a seaworthy vessel and to indemnify persons injured in consequence of a breach of such duty is an established concept of admiralty law, notwithstanding its ancient and "perhaps unascertainable" origins.[11] In England, seamen first obtained the protection of this "humanitarian policy" in 1876;[12] in this country not until 1903. Since *The Osceola*, the application of the doctrine has required the attention of this Court on several occasions. Thus far the principle adjudications have established that it is not limited solely to the immediate employees of the shipowner, but extends to other categories of workers who are injured in the service of the vessel;[13] it is immaterial whether the unseaworthy condition was latent or could have been avoided by due diligence;[14] or that the unseaworthy appliance was not part of the ship's equipment but was brought aboard by an independent contractor.[15]

Two basic considerations have motivated these recent decisions: (a) the hazardous nature of marine operation remains unchanged, but with modern specialization of labor,

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[11] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 91, 66 S.Ct. 872, 875.

[12] *The Osceola*, 189 U.S. 158, 171; 23 S.Ct. 483, 487 (1903).

[13] *Seas Shipping Co.* v. *Sieracki, supra; Pope & Talbot Inc.* v. *Hawn, supra.*

[14] *Mahnich* v. *Southern SS Co.*, 321 U.S. 96, 64 S.Ct. 455.

[15] *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, 74 S.Ct. 601.

many different categories of workers are now exposed to the dangers which originally confronted seamen only;[16] (b) the brunt of the loss to the victim of an unseaworthy vessel and his dependents should be assumed by the shipowner because of his ability to distribute the loss over the industry. Otherwise, unable to discover or remove the cause of the evil, the person injured might not recover under ordinary rules of negligence.[17]

The application of these principles, however, has resulted in some degree of uncertainty as to the ultimate scope of the doctrine. The current decisions are in conflict and the conflict, in the main, stems from a restrictive and exclusive application of the first of the two premises. Where the lower courts have adopted the "ship's work" criterion as the sole test, an unseaworthy vessel and its owner have been exonerated,[18] unless "the work on which the plaintiff

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[16] "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. * * * this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. * * * The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done." *Seas Shipping Co.* v. *Sieracki*, pp. 94-95.

[17] "These (hazards of marine service), together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, *supra*, pp. 93-94.

[18] *Berryhill* v. *Pacific Far East Lines*, 9 Cir. 1956, 238 F.2d 385, cert. den. 354 U.S. 938, 77 S.Ct. 1400. Shoreside machinist injured on drydocked vessel by grinding wheel furnished by employer which disintegrated while repairing propulsion machinery. Doc-

was engaged was of a kind that the crew of a vessel was accustomed to perform."[19] Where, however, the Courts have not attempted to match or sought equivalence in the operating requirements of ancient and modern maritime service, the test applied has been simply lawful presence on

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trine of unseaworthiness held not applicable because person injured was not doing ship's work "to be performed historically or currently by the crew" p. 387. The same Court in *Petterson* v. *Alaska S.S. Co.*, 9 Cir. 1953, 205 F.2d 478, affd. per curiam 347 U.S. 396, 74 S.Ct. 601 (1954) had permitted recovery to a longshoreman injured by a defective block which his employer had brought aboard the vessel. Cf. *Read* v. *United States*, 3 Cir. 1953, 201 F.2d 758 holding warranty extended to "business guest" engaged in changing a Liberty ship into a transport because of "failure to supply and keep in order the proper appliances appurtenant to the ship" p. 762. Per contra, *Berge* v. *Nat'l Bulk Carriers Corp.*, 2 Cir. 1958, 251 F.2d 717, cert. den. 78 S.Ct. 994, where a sheared shackle pin, admittedly unseaworthy, did not make shipowner liable, because vessel was undergoing "virtual rebuilding" and "reconstruction of a ship was not traditionally the task of the crew" p. 718. In accord, *Raidy* v. *U. S.*, 4 Cir. 1958, 252 F.2d 117 affg. 153 F.Supp. 777; *West* v. *U. S.* (D.C.E.D. Pa. 1956), 143 F. Supp. 473, 479. *Halecki Admx.* v. *United N. Y. & N. J. S. H. P. Assn.*, 2 Cir. 1958, 251 F.2d 708, cert. granted June 9, 1958. Shoreside repairman engaged in cleaning engine room of pilot boat, drydocked for annual repairs, died of tetrachloride poisoning. Recovery allowed because deceased's activities were essentially crew work "and as to that it makes no difference that the means employed have changed with time" p. 711. See also: *Lester* v. *U. S.*, 2 Cir. 1956, 234 F.2d 625, 629, cert. den. 352 U.S. 889, 77 S.Ct. 130. *Imperial Oil, Ltd.* v. *Drlik*, 6 Cir. 1956, 234 F.2d 4, 8, where Court found that doctrine extended to a shoreside electrician and shipyard worker on a drydocked vessel, but found no unseaworthy condition. In *Union Carbide Corp.* v. *Goett*, 4 Cir. 1958, 256 F.2d 449, a sandblaster was denied recovery because a vessel, drydocked for repairs and structural changes, could not be seaworthy, following the *Berge*, *Raidy* and *Lester* decisions, *supra*. In *McDaniel* v. *Lisholt*, 155 F.Supp. 619 (D.C.S.D.N.Y. 1957) affd. 2 Cir. 1958, —— F.2d ——, a Canal Zone fireman injured by an explosion on a previously fire-disabled vessel, was denied recovery because he was not performing any traditional or customary work of a seaman.

[19] *Berge* v. *National Bulk Carriers Corp.*, *supra*, p. 718.

the vessel with the owner's consent or by his arrangement.[20] The majority and minority opinions of the Court below reflect this divergence and it is assumed that certiorari was granted in the instant case in order that this issue might be finally resolved.

The majority of the Court below, in denying Kermarec the protection of a seaworthy stairway declared " . . . We cannot say that this guest of a member of the crew, who came aboard for a social visit, even with the owner's acquiescence, should be classed as a seaman and entitled to sue for unseaworthiness" p. 178. The Court was thus limiting its application of the *Sieracki* and *Hawn* decisions solely to those shoreside workers who demonstrably were engaged in activity previously performed by seamen. For the Court also stated "Kermarec did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness" p. 178.

This Court could not have intended so narrow and unrealistic a limitation of the principle. Were it to have done

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[20] *Ross* v. *Steamship Zeeland*, 4 Cir. 1957, 240 F.2d 820. Night watchman employed by port service injured by coil of wire on tween deck which was inadequately illuminated. "It (the vessel) was not reasonably fit to permit libellant to perform his task with reasonable safety" p. 823. *Amerocean Steamship Company* v. *Copp, Jr.*, 9 Cir. 1957, 245 F.2d 291. Rigger on vessel drydocked for refurbishing slipped on oily deck. Recovery allowed. "Any vestiges of immunity from liability for negligent acts toward outsiders who are not seamen have disappeared" p. 293. *Byrd* v. *Napoleon-Avenue Ferry Co.*, 125 F.Supp. 573 (D.C.E.D. La. 1954), aff'd 5 Cir. 1955, 227 F.2d 958, cert. den. 351 U.S. 925, 76 S.Ct. 783. Recovery allowed to injured passenger on unseaworthy ferry. *Caudill* v. *Victory Carriers Inc.*, 149 F.Supp. 11, 15 (D.C.E.D. Va. 1957). Doctrine applied to soldier assigned to a floating crane and injured descending defective Jacob's ladder of defendant's vessel, used for access to crane from the vessel.

so, the anarchic living and working conditions of seamen which prevailed on the sailboat would now determine and circumscribe those who require the same protection, even more so, in the era of the atom-powered vessel.[21] But assuming, as we must, that this Court intended no such dead-hand shackling, and opened the benefits to all ship workers, regardless of their activity or the nature of their employment, what of the host of shipboard visitors, whose presence on the vessel is not immediately related to its operation? Was it intended to deny the protection of a seaworthy vessel to the governmental agency inspector, i.e., Custom House, Coast Guard, Immigration, etc.,[22] or to the marine insurance claim investigator, the labor union representative, the ship's passenger[23] and his guests, cargo agents, the family and friends of the crew members, who, because of modern quick turn-around voyages, might not have time to leave the vessel? This question we believe is tendered to the Court for the first time.

Three answers are possible: (a) the absolute liability of a shipowner for an unseaworthy vessel is to be limited only to workers performing a "ship work" function; (b) it extends also to those who under common law would be classified as "business invitees" but not to "licensees"; (c) it extends to all who are lawfully present on the vessel.

We submit that logic as well as the "urgent and sound reasons of public policy" which initially gave rise to the

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[21] See excellent summary by Parker, J. in *The State of Maryland*, 4 Cir. 1936, 85 F.2d 944, of the new age of navigation and its requirements.

[22] *McDaniel* v. *The Lisholt*, 155 F.Supp. 619 (S.D.N.Y. 1957) affd. —— F.2d —— (2 Cir. July 10, 1958) where a Canal Zone fireman was denied recovery.

[23] *Byrd* v. *Napoleon Ave. Ferry Co.*, 125 F.Supp. 573 (E.D. La. 1954) affd. 5 Cir. 1955, 227 F.2d 958, cert. den. 351 U.S. 925, 76 S.Ct. 783, where recovery was allowed.

doctrine of unseaworthiness, dictate the adoption of the last formulation. Otherwise, the law would permit the irrational result that the same defectively affixed canvas runner could create different degrees of liability dependent solely upon the wholly fortuitous circumstance that it was a crew member, or a longshoreman and not Kermarec who was injured when the canvas gave way. Thus, had Yves and Kermarec been injured simultaneously, the majority of the Court below would have had to hold that Yves, alone, could recover. To limit the doctrine solely to "ship workers" would ignore the many non-manual services which are both required by and imposed upon the shipowner in order to conduct safely a modern maritime operation. It would compel the Courts, moreover, in slow, piecemeal fashion, to analogize every injured worker's activity in terms of the original function of seamen in a pre-industrial era.[24] The inevitable conflict in the findings would perpetuate the current uncertainty and decisional disharmony, the elimination of which has been the historic function of admiralty law. To extend the doctrine to "business invitees" would be a welcome clarification. But, as we shall develop in a later point, it would import into the field of admiralty the needless confusion which has totally destroyed the utility of the invitee-licensee concept at common law. It would also produce the rather anomalous result that the injured invitee would be given the added protection of the shipowner's absolute liability, whereas the less legally protected licensee would be denied it. Finally, if it be sound public policy to

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[24] Judicial resistance to *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, 74 S.Ct. 601, is reflected in the "structural alteration" limitation adopted recently in *Berge* v. *Nat'l Bulk Carriers*, *Berryhill* v. *Pacific Far East*, *Raidy* v. *U. S.*, *Lester* v. *U. S.*, *Union Carbide* v. *Goett* and *Imperial Oil* v. *Drlik*, *supra*, ftn. 18. This issue is not involved here. Kermarec was injured on a functioning vessel. *Quaere*, however, whether antipathy to any further extension of the doctrine of unseaworthiness has not obscured the essential determinant in these cases—has a maritime tort occurred? This and not the nature or extent of ship repairs should control.

compel the shipowner to provide a seaworthy vessel for any specific group of workers, that duty realistically is not enlarged, but its salutory purpose is that much more effectively achieved by extending the duty to all persons who may be exposed to the same marine peril.

In *Byrd* v. *Napoleon Avenue Ferry Co., supra,* the Court declared:

> "It is true that in Pope & Talbot, the plaintiff was a ship repairman, whereas here libellant was a passenger on a ferry. Nevertheless, the basis of her action, like Hawn's, was maritime tort and *there is nothing in Pope and Talbot which would limit its application to maritime tort relating only to ship repairmen*" p. 577. (Emphasis added.)

In *Caudill* v. *Victory Carriers, supra,* the Court went further and stated:

> "The day may come, if it has not already arrived, when the *doctrine of unseaworthiness will be extended to all business invitees aboard ship,* for Sieracki holds that liability arises as an incident of performing the ship's service with the owner's consent" p. 15. (Emphasis added.)

In neither case, it is submitted, did the Court go far enough. For the essential justification of the doctrine is best formulated in the reasoning of Chief Judge Clark in his dissenting opinion below.

> "While it is true that the Supreme Court referred to the type of work done by Hawn as one reason for allowing him to recover for unseaworthiness, I do not believe performance of 'ship's work' is a *sine qua non* to recovery on that theory. The Sieracki case, which Pope & Talbot, Inc., followed, gave as the reason for

extending the unseaworthiness doctrine to certain non-seamen the similarity of such individuals to seamen as regards exposure to the same dangerous appliances, inability to bear the expense of injury, inability to discover or remove the dangerous condition, inability to recover for the loss from their employer, and inability to distribute the loss to the shipping industry as well as the shipowner. Seas Shipping Co. v. Sieracki, supra, 328 U.S. 85, 95-96, 66 S.Ct. 872, 90 L.Ed. 1099. Plaintiff meets these criteria" p. 183.

III.

Whatever Standard of Care Was Due Petitioner, Respondent Was Negligent.

A. Where, as Here, Federal Maritime Law Is Exclusively Applicable, the Judicial Law-Making Powers of This Court Can and Should Be Exercised as a Matter of Public Policy, to Eliminate All Distinctions Between "Invitee" and "Licensee" and This Court Should Substitute a Single Standard of Due Care for All Authorized Shipboard Visitors.

This Court has never definitively decided the applicable standard of care due an authorized shipboard visitor. Nor has it made any clear pronouncement adopting and incorporating the rigid common law categories of licensee/invitee into the federal maritime law. *Leathers* v. *Blessing*, 105 U.S. 626, 629 (1881). See, *Aho* v. *Jacobsen*, 1 Cir. 1957, 249 F.2d 309, 313 (cert. pending). The instant case affords an opportunity, therefore, for a further contribution of maritime law towards a liberal and socially responsive American jurisprudence.

That this Court is empowered to declare the general maritime law, and in its discretion to reject contrary state

or common law, cannot be questioned.[25] "The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly * * * exclusively a judicial question." [26] The power is derived from the Constitution[27] and the Judiciary Act of 1789.[28] Accordingly, "the main source of maritime law" has been the decisions of this Court.[29] Thus, it has rejected the common law rule of contributory negligence as an absolute defense and enforced the principle of comparative fault.[30] It has adopted and extended the rule of liability without fault for unseaworthiness and maintenance and cure without regard to the common law doctrines of assumption of risk or the fellow servant rule.[31] "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." [32]

It is submitted that the time is long overdue for discarding the licensee-invitee categories in favor of a single stand-

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[25] *The Lottawanna*, 88 U.S. (21 Wall.) 558; *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36, 40-41, 63 S.Ct. 488, 491; *Pope & Talbot Inc.* v. *Hawn*, *supra*, pp. 409-410.

[26] *The Lottawanna*, *supra*, pp. 575, 576.

[27] Art. III, § 2.

[28] § 9, 1 Stat. 76; 28 U.S.C. 1333.

[29] *Pope & Talbot* v. *Hawn*, *supra*, p. 418.

[30] *The Max Morris*, 137 U.S. 1, 14-15; *Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 382-384, 38 S.Ct. 501; *Pope & Talbot* v. *Hawn*, *supra*, pp. 408-411.

[31] *The Osceola*, *supra*, p. 175; *Mahnich* v. *Southern SS Co.*, *supra*, pp. 102-104; *Warren* v. *U. S.*, 340 U.S. 523, 529-30, 71 S.Ct. 432. *Seas Shipping* v. *Sieracki*, *supra*, pp. 89-96; *Alaska SS Co.* v. *Petterson*, *supra*, pp. 401-402. See also *Cox* v. *Roth*, 348 U.S. 207, 210, 75 S.Ct. 242.

[32] *Garrett* v. *Moore-McCormack Co.*, *supra*, p. 244, citing *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205; *Chelentis* v. *Luckenbach SS Co.*, *supra*; *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 159; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259; *Messel* v. *Foundation Co.*, 274 U.S. 427, 434.

ard of care for all persons lawfully on the premises. It may now be too late to accomplish this in the civil law, except by remedial state legislation. But within the sphere of the general maritime law, this Court is unencumbered by precedent and may in its discretion refuse to engraft upon the maritime law an ancient concept which has outlived whatever justification it originally possessed.

In determining the advisability of establishing one standard of care for all authorized shipboard visitors, the Court will undoubtedly take judicial notice that the present status of the common law in this area is characterized by confusion, conflict and contradiction, often within the same jurisdiction or court. Predictability and uniformity —especially significant in admiralty[33]—have no place in the current maze. The just decision today is frequently impossible except through such skillful use of semantics as to recall Mr. Justice Cardozo's comment "discrimination so subtle is a feat beyond the compass of ordinary minds." [34]

It is true, as Chief Judge Clark remarked, that the "distinctions (invitee, licensee and trespasser) have been more and more obscured during the last century as Courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances." [35] But the very fact that his appeal to reason came in dissent, points up the need to exorcise a concept feudal in origin and rooted in class privilege.[36]

The chaotic state of the common law in the area of the occupier's liability to the invitee and licensee is strikingly

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[33] *The Lottawanna, supra*, p. 575.

[34] *Shepard* v. *United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 25.

[35] *Kermarec* v. *Compagnie Generale Transatlantique, supra*, p. 180.

[36] 2 *Harper & James, The Law of Torts*, § 27.1, p. 1432 (1956). See also *Aho* v. *Jacobsen, supra*, pp. 311-312.

illustrated by a comparison of the cases."[37] The extended footnote appended to this brief is not intended to be comprehensive or exhaustive. Rather, it is intended to highlight some of the glaring conflicts and contradictions, which this Court would inevitably perpetuate, were it to apply the licensee-invitee concepts to the case at bar.

In this connection we respectfully call the Court's attention to the passage of the Occupiers Liability Act, 1957 (5 & 6 Eliz. 2c. 31) which has finally abolished the distinction between licensee and invitee in favor of a single standard of duty.

The Act had been preceded by sharp criticism of the state of the law in England.

> "The law on the whole subject is still in a confused state. The delimitation between the different categories (sc. of persons entering on premises occupied by others) is far from settled, nor is it possible to state with certainty the duties owed to persons falling within those categories. Had it been earlier and more generally recognised that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into strait jackets to fit the character in which the plaintiff comes on to the premises and the law would then have been freed of some needless refinements and profitless distinctions." *Salmond on Torts*, 10th ed at p. 471.[38]

The enactment had been recommended in the "Third Report of the Law Reform Committee (1954)," a body of leading

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[37] See Appendix.

[38] For a more tolerant attitude see *Pollack on Torts*, 15 Ed. pp. 409-410 (1951).

English jurists who found the common law concepts entirely unnecessary and in some aspects even absurd.[39]

> "It is, indeed, really impossible without lapsing into absurdities to adhere strictly to the criterion of actual knowledge: nor in our view is it a desirable test. It seems to us to put a premium on negligence. An occupier who inspects his property periodically may actually know of dangers of which an occupier so careless that he never inspects may remain ignorant. Thus the 'mere licensee's' prospect of recovering damages from some injury sustained through a defect in the premises may vary with the occupier's habits as regards inspection. If the occupier is so negligent as never to inspect at all, he may not know of the trap which causes the damage, in which case the mere licensee has no remedy. If the occupier takes the trouble to inspect from time to time he may know of the trap, in which case, if he has omitted to warn the mere licensee of its presence, the latter on suffering damage from it has a good cause of action. We cannot think it is satisfactory to make the injured licensee's position depend on the idiosyncrasies of the particular occupier." Law Reform Committee, Third Report, pp. 31-32.

The Occupiers Liability Act of 1957 establishes a single standard of duty toward all persons who visit the premises of the occupier upon his invitation or with his consent. This duty is defined in the following terms:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is

[39] Copies of the Act and Law Reform Committee Report have been deposited with the Clerk for the Court's convenience.

invited or permitted by the occupier to be there." Sec. 2 (2).

The Act further provides that the single standard of care is applicable to regulate

> "the obligations of a person occupying or having control over any fixed or moveable structure, *including any vessel*, vehicle or aircraft." Sec. 1 (3)(a). (Emphasis added.)

The disability of the licensee *vis à vis* his host rests upon two assumptions: (a) he assumes the risk that the premises may be dangerous, and (b) if injured, is contributorily negligent because he voluntarily exposed himself to this risk.[40]

We suggest this formulation only to demonstrate that the issue now before the Court was in fact resolved when the Court refused to incorporate the common law defense of contributory negligence into the general maritime law. Its reasoning then is equally applicable now:

> "The harsh rule of the common law under which contributory negligence [a licensee's legal disability] wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages [the safety of the premises and of all the circumstances attending an injury to a lawful visitor] as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine

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[40] 2 *Harper & James, The Law of Torts*, 1956, p. 1162.

which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight [solely by reason of the fortuitous nature of their lawful visit]."[41] (Interpolations added.)

B. Even if the Federal Maritime Law Recognizes a Distinction Between Invitee and Licensee, Appellant Was an Invitee to Whom Respondent Owed a Duty of Reasonable Care.

Should the common law distinction between invitee and licensee be held to apply to federal maritime law,[42] the appellant is still entitled to recovery since the evidence was sufficient to establish that he was an invitee on respondent's vessel.

The majority of the Court below rests its conclusion on three erroneous assumptions. Kermarec was not an invitee, it declared, because (a) the law "has long been settled that the guest of a seaman is nothing more than a licensee" p. 177; hence it could not consider any "novel question." (b) Precedent aside, only a business visitor can be an invitee. Since a shipowner derives no economic benefit from the social guest of a crew member, the guest by definition, cannot be an invitee. (c) Were the Court free to consider the analogy of a landlord's duty to the guest of a tenant, it would reject it as inapplicable because a shipowner is not a landlord and his "relationship to his seamen is very different from that of a landlord to his tenant" p. 177.

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[41] *Pope & Talbot Inc.* v. *Hawn, supra,* pp. 408-409.

[42] *McDaniel* v. *The Lisholt, supra,* p. 627; *Kermarec* v. *Compagnie Generale Transatlantique, supra,* p. 177; *Aho* v. *Jacobsen, supra,* p. 311. Cf. *Leathers* v. *Blessing, supra,* p. 629 with *The Sudbury,* 14 F.2 533 (D.C. Ore. 1926).

The dissenting opinion below exposes the fallacies:

First: "Economic benefit" is not the sole criterion in determining an invitee status. "Invitation," of whatever nature, equally controls. "If invitation is the touchstone, it must be shown that persons authorized by the defendant led the plaintiff to believe that the owner intended the premises to be used by visitors for this purpose and adopted the premises for that use" p. 180.

In *Gunnarson* v. *Robert Jacob, Inc.*, 2 Cir. 1938, 94 F.2d 170, cert. den. 303 U.S. 660, reh. den. 304 U.S. 588, Judge Learned Hand recognized this dualism.

> "The doctrine is well settled; the relation with its resulting duty arises only when the person who enters the premises does so in the interest of the owner, *or upon some business of his own, of which the owner has notice and to an entry in pursuit of which he consents, directly or indirectly*" p. 171. (Emphasis added.)

This formulation of the alternative test was not new. In *Cooley, Law of Torts*, 3rd ed. (1906) Vol. 2, p. 1259, the same statement of the law is found:

> "When one expressly or by implication invites others to come upon his premises whether for business *or for any other purpose*, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises safe for the visit." (Emphasis added.)

Second: There is no body of precedent that the social guest of a seaman is a licensee. The cases cited by the majority are distinguishable, as Chief Judge Clark demonstrated, by the absence of both elements, i.e., there was neither "invitation" nor "economic benefit."

Third: In the instant case, Kermarec was an invitee because he met both requirements. There was "invitation" because the shipowner had expressly authorized his visit, by the issuance of an official visitor's pass. The shipowner here, therefore, unlike those in the cases cited by the Court below, had notice of Kermarec's intended visit, and had consented to it. This was an implied if not an express invitation,[43] which alone could create an invitee status despite the absence of any economic benefit to the shipowner.[44]

There was also "economic benefit" to the respondent from Kermarec's visit, albeit of an indirect nature. We need not expand on the cogent reasoning of Chief Judge Clark which led him to this conclusion. "In view of the shipowner's liability to the seaman for injuries suffered in shoreside recreation, it is in the owner's economic interest to encourage recreation aboard ship, rather than ashore, thus making the seaman's activities subject to control and the men available on ship whenever needed."[45] Nor is there

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[43] Should it make any difference whether the host or guest initiates the invitation provided it is accepted?

[44] *Radoslovitch* v. *Navigazione Libera Triestina, S.A.*, 2 Cir., 72 F.2d 367; *Griffiths* v. *Seaboard Midland Petroleum Co.*, 33 A.M.C. 911; Cf. *The Francesca* (D.C.W.D.N.Y.), 37 A.M.C. 1006; *The Cayuga*, 9 Cir., 37 A.M.C. 203; *McLaughlin* v. *Mulqueen* (D.C. E.D.N.Y.), 29 A.M.C. 1626. See, also, *Tide Water Associated Oil Co.* v. *Richardson*, 9 Cir. 1948, 169 F.2d 802, 803. Coast Guard seaman whose "duty to make his inspection was known to the mate • • • as was the likelihood of (plaintiff's) passing thru the curtained opening toward the nearby unguarded hatch in the discharge of that duty"; *Quinn* v. *Staten Island R.T. Ry. Co.*, 224 N.Y. 493, 496 (1918). Coal barge captain injured on defendant's dock had "implied invitation" to go ashore to attend church services. *Phillips* v. *United States*, 102 F.Supp. 943, 946 (E.D. Tenn. 1952). Plaintiff injured in pass office of Oak Ridge Reservation, where she was seeking a pass to investigate her son's accident in the reservation, was invitee.

[45] P. 181, citing *Warren* v. *United States*, 340 U.S. 523, 71 S.Ct. 432; *Aguilar* v. *Standard Oil Company*, 318 U.S. 724, 63 S.Ct. 930; *Farrell* v. *United States*, 336 U.S. 511, 69 S.Ct. 707 and *Nowery* v.

any logic in labelling the guest of a passenger an invitee, but refusing such status to the guest of a seaman. *McCann* v. *Anchor Line*, 2 Cir. 1935, 79 F.2d 338, *Voirin* v. *Compagnie Generale Transatlantique (The Champlain)*, 151 Misc. 498, 270 N.Y.S 643, 1934 A.M.C. 25. In the maritime cases particularly, "economic benefit," though slight and most indirect, has been held sufficient as a matter of law and policy, to clothe the plaintiff with the status of invitee.[46] "It is not necessary that the visitor should himself be upon the land for the purposes of the possessor's business. The visit may be for the convenience or arise out of the necessities of others who are themselves upon the land for such a purpose" 2 Restatement of Torts, § 332, comment d, 1934, p. 990.

Fourth: The vessel, for all practical purposes, is a seaman's home and the tenant-guest-landlord analogy is pertinent.

> "Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity,

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Smith (D.C.E.D. Pa.), 69 F.Supp. 755, affd. 3 Cir., 161 F.2d 732. It is not generally appreciated that even when in port, seamen may not have adequate opportunity for their personal affairs. Vessels, today, keep tight schedules, particularly the tanker and passenger. The short turn-around in port frequently compels the seaman to see his family and friends on the vessel or pier. In fact, this is encouraged by the shipowner to avoid lateness and last minute crew shortages requiring "pier-head jumps."

[46] *Griffiths* v. *Seaboard Midland Petroleum Corp., supra; Radoslovitch* v. *Navigazione Libera Triestina S.A., supra; Middleton* v. *P. Sanford Ross Inc.*, 5 Cir. 1914, 213 F.6; *New York Lubricating Oil Co.* v. *Pusey*, 2 Cir. 1914, 211 F. 622. See also *Quinn* v. *Staten Island R.T. Ry. Co., supra; McFall* v. *Compagnie Maritime Belge*, 304 N.Y. 314 (1952) and cases in the Appendix where economic benefit in diverse situations similar to and often weaker than the case at bar was found to justify recovery for an invitee.

during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence." [47]

If the social guests of the tenant can hold the landlord to a duty of reasonable care in the maintenance of the building's common stairways and approaches,[48] and if such duty extends even to the social guest of the janitor,[49] *a fortiori*, the authorized guest of a seaman should be entitled to the same degree of protection from the shipowner. "A person may be a business visitor of a lessor of land although he is merely a gratuitous licensee of the lessee." [50]

When Kermarec started to descend the stairway, he had a right to assume that it was safe to do so. It was a common stairway intended to be used by crew, passengers and anyone who was lawfully on the vessel. Whether, in fact, it was safe should be determined by the usual rule of reasonable care without regard to the status of the person injured. If the licensee-invitee classification must be followed, however, it is submitted that petitioner was entitled to the preferred status of invitee, and the Courts below erred in treating him as a licensee.

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[47] *Aguilar* v. *Standard Oil Company, supra*, p. 934.

[48] *Pessagno* v. *Euclid Inv. Co.*, D.C. Cir., 112 F.2d 577; *Klotz* v. *Ganz*, 296 N.Y. 715, 70 N.E.2d 538; *Bowers* v. *City Bank Farmers Trust Co.*, 282 N.Y. 442, 26 N.E.2d 970; *Gilcher* v. *McNulty Bros. Realty Co.*, 295 N.Y. 743.

[49] *Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N.Y.S. 2d 666, affd. 261 App. Div. 1105, 27 N.Y.S. 2d 1003.

[50] 2 *Restatement of Torts*, § 332, comment h, p. 901; § 360, p. 976.

C. If Petitioner Was a Licensee the Respondent Breached a Duty Due Him. The Evidence Supports the Verdict. It Was Error to Set It Aside.

If clearer evidence were necessary to prove the confusion now rampant in the law of licensee and invitee, and the need for a single standard of care toward all lawful visitors, the instant case provides it.

The Trial Court and the majority of the Court below adopted the classic definition of the duty owed to a licensee, i.e. "the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."[51] Pursuant thereto, two essential issues were presented to the jury: Was there a dangerous condition, and did the shipowner know of it? The jury found in the affirmative, but both Courts disagreed. There was no evidence of a dangerous condition, declared both Courts because "There was no evidence that the tacks were inadequate" or that "they were not suited for the purpose."[52] Probably intending the same conclusion of law, the Trial Court stated: "• • • the question is not whether the defendant should have known of the dangerous condition, if in fact it was dangerous, but whether it actually did know of it."[53] The Majority below put it this way: "• • • this (lack of evidence that tacks were inadequate) was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stair-

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[51] Majority Opinion, p. 178. Charge to jury (R. 79).

[52] Majority Opinion, p. 178. Memorandum of Trial Court (R. 93).

[53] Memorandum of Trial Court (R. 93).

way presented a condition of danger to Kermarec of which he should have been warned." [54]

It is submitted that on both issues—the dangerous condition and respondent's knowledge thereof—both Courts erred.

As to the first, the question was not solely the size or adequacy of the tacks, but whether, considering the length of the runner, and the heavy traffic on the stairway (R. 56, 61), two carpet tacks, removable by hand alone, and placed only at the front of each tread with nothing to hold the canvas in place at the rear of the step, or against the riser to the step above, were sufficient to keep the canvas from coming loose and slipping off the step under the cumulative weight and repeated jarring of those using the stairway. We may assume that had a sufficient number of tacks been used, the canvas could have been held in place. But the question before the jury was simply whether two tacks alone were enough under the circumstances. To say, therefore, that there was no evidence that the tacks were inadequate for their purpose, in whatever sense the term "adequate" was used, is simply to ignore the evidence and defy reality. The jury unquestionably could find, and did, that a dangerous condition existed on the stairway as Kermarec started to descend.

With respect to the second issue—respondent's knowledge of the dangerous condition—there is no need to enlarge upon Chief Judge Clark's analysis,[55] except to refer to additional authorities.[56]

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[54] Majority Opinion, pp. 178-179.

[55] Dissenting Opinion, pp. 179, 182.

[56] *Negligent Activity of Occupier: Meek* v. *Cordisello*, 266 App. Div. 1044, 44 N.Y.S. 2d 529. Plaintiff, "'an invitee or licensee,' injured by falling tree, partially sawed by defendant's employees

"The opportunities for loose or bulging canvas to trip users of the stairs are so obvious to anyone who has ever mounted a stairway that not surprisingly the jury found Bourdon had actual knowledge of the danger, but was too lazy to remedy it by securing the material properly.

Neither under the erroneous charge which the trial court gave the jury nor under the more favorable in-

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who left the tree before the accident, permitted to recover. *Radio Cab Inc.* v. *Hauser*, C.C.A.D.C. 1942, 128 F.2d 604. Defendant, business invitee of gas station, injured plaintiff, licensee, and invoked owners immunity. Defendant liable. Where "• • • the injury results from negligent acts of the occupier or his servants, the immunity disappears and the liability of the occupier is the same to a licensee as to an invitee." p. 605. The active negligence which imposes liability on the occupier need not occur while the licensee is on the premises. *Masek* v. *Bubenheimer*, 229 Wisc. 194, 281 N.W. 924; *Meek* v. *Corbisello, supra;* see *Atlantic Greyhound Corp.* v. *Newton*, 4 Cir. 1942, 131 Fed. 2d 845. The doctrine of active negligence is said to be an "attempt to remedy a perceived injustice by mitigating the old rule that the property owner was liable to noninvitees only for wilful or wanton injuries." 156 A.L.R. 1226.

Dangerous Condition of Premises: The Blue Moon III, W.D. N.Y. 1932, 60 F.2d 653. Licensee directed aboard vessel by defendant's employee, knowing deck had recently been waxed. Owner liable. "• • • A dangerous condition existed • • • which was within the knowledge of respondent's employee • • •." p. 654. *Gleason* v. *Academy of the Holy Cross*, D.C. Cir., 1948, 168 F.2d 561. Defendant liable to licensee who fell from top step of school balcony. "Dangers that reasonably careful people are likely not to discover are latent or hidden." p. 562. See, also, *Recreation Centre Corp.* v. *Zimmerman*, 172 Md. 309, 191 Atl. 233 (defect in step); *Morrison* v. *Carpenter*, 179 Mich. 207, 146 N.W. 106 (unexpected step down in dark).

Knowledge of Danger Imputed When Knowledge of Condition Known—The Objective Test: The Blue Moon III, supra, p. 654; *Ward* v. *Avery*, 113 Conn. 394, 155 Atl. 502, 503; *Olderman* v. *Bridgeport City Trust Co.*, 125 Conn. 177, 4 Atl. 2d 646, 648. The English law is in accord. *Hawkins* v. *Coulsdon and Purley U. D. Co.* (1953, 2 All. E.R. 364, *aff'd.* 1 All. E.R. 97, 108 (Ct. of App.) (L. J. Romer.); *Pearson* v. *Lambeth Borough Council* (1950), 2 K.B. 353, aff'd. (1950), 1 All. E.R. 682 (Ct. of App.); *Slater* v. *Clay Cross Co. Ltd.* (1956), 3 W.L.R. 232 (Ct. of App.).

structions to which the plaintiff was entitled was it necessary to show that the defendant company (i.e., its top officers) had actual knowledge of the danger: (1) If liability rests on Bourdon's affirmative negligence in improperly tacking the carpet, his employer is vicariously liable without fault of its own on principles of *respondeat superior;* (2) if the fault is the company's failure to repair or warn of a hidden dangerous condition, actual knowledge of the employee who created it may be imputed to the employer because the knowledge concerns a matter as to which the employee acts within the scope of the employment, e.g., 1 Restatement, Agency § 272, comment *a*2 (1933); In re Texas City Disaster Litigation, 5 Cir., 197 F.2d 771, affirmed 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427; Cashin v. Northern Pac. Ry. Co., 96 Mont. 92, 108, 28 P.2d 862, 868;"

One year before the passage of the Occupiers' Liability Act of 1957, Lord Justice Denning, in *Slater* v. *Clay Cross Co. Ltd.* (1956), 3 W.L.R. 232 (Ct. of App.), noted that the modern English cases had effectively obliterated the distinction in the duty owed to an invitee and to a licensee in the instant type of situation where the occupier had, through its servant, actual knowledge of the physical condition. The Lord Justice states:

"The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts. The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point. The

decision of the court in *Hawkins* v. *Coulsdon and Purley Urban Dist. Council;* * * * shows that a licensor, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger; the local authority did not know it was a danger, but they ought to have known it; and they were held liable. The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them; and it makes no difference whether they are invitees or licensees * * * "

At the risk of laboring the point, we respectfully repeat that petitioner should never have become entrapped in the semantic quicksand of whether he was a licensee or invitee. The protracted litigation in this case indicates the need for a single standard of care. But if Kermarec was a licensee, he is nevertheless entitled to his verdict. The fact that this case was tried on two occasions with the first jury unable to agree and the second rendering its verdict for the petitioner, presumptively indicates that there were questions of fact to be determined by the jury. The judges of the Courts below also were unable to agree on their findings of fact. Under such circumstances one cannot say that reasonable men could not have differed and that there was no evidence to justify the verdict.

If the "single question" on this appeal is whether " * * * there was any evidence upon which the jury could have found negligence on the part of the respondent * * * ,"[57] that question here should be answered in the affirmative.

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[57] *Eckenrode* v. *Penn. R. Co.*, 335 U.S. 329, 330, 69 S.Ct. 91, 92; *Rogers* v. *Missouri Pacific Ry. Co.*, 352 U.S. 500, 77 S.Ct. 443, 451; *Palermo* v. *Luckenbach Steamship Co.*, 355 U.S. 18; 78 S.Ct. 1; *Gibson* v. *Thompson*, 355 U.S. 18; 78 S.Ct. 3.

CONCLUSION

The facts having been resolved in favor of the petitioner, even on a charge less favorable than that to which he was entitled, the jury verdict should not have been disturbed and should now be reinstated.

Respectfully submitted,

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APPENDIX

Footnote 37

THE CONFUSION IN THE CASE LAW

A. Distinction Between Invitee and Licensee

1. The friend of a customer in the owner's store.
   a. Invitee—*Briggs* v. *John Yeon Co.*, 168 Ore. 239, 122 P.2d 444 (1942)
   b. Licensee—*Flickenstein* v. *Great Atl. etc. Tea Co.*, 91 N.J.L. 145, 102 Atl. 700 (1917)
2. The child of a customer in the owner's store.
   a. Invitee—*Grogan* v. *O'Keefe's Inc.*, 267 Mass. 189, 166 N.E. 721 (1929)
   b. Licensee—*Petree* v. *Davison-Paxon Stokes Co.*, 30 Ga. App. 490, 118 S.E. 697 (1923)
3. Person entering business establishment for non-related purpose.
   a. Invitee—*Ward* v. *Avery*, 113 Conn. 394, 155 Atl. 502 (1931)
   b. Licensee—*Bird* v. *Clover Leaf-Harris Dairy*, 125 P.2d 797 (Utah S.Ct. 1942)
4. Guest of janitor.
   a. Invitee—*Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N.Y.S. 2d 666 (2d Dept. 1941)
   b. Licensee—*Barthowski* v. *Schrembs*, 67 N.E. 2d 922 (Ohio App. 1944)
5. Doctor visiting employee in factory.
   a. Invitee—*Jones* v. *Pa. Coal etc. Corp.*, 255 Pa. 339, 99 Atl. 1008 (1917)
   b. Licensee—*Wilson* v. *Goodrich*, 218 Iowa 462, 252 N.W. 142 (1934)

6. Inquiry in reference to vacancy on premises.

   a. Invitee—*Oettinger* v. *Stewart*, 24 Cal. 2d 133, 148 P.2d 19 (1944) (No sign out; placecard indicating "office")
   Fogerty v. *Bogart*, 59 App. Div. 114, 69 N.Y.S. 47 (2d Dept. 1901) ("Flat to Let" sign)

   b. Licensee—*Mills* v. *Heidingsfiled*, 192 So. 786 (La. App. 1939) (No evidence of a general advertisement)

7. Going on premises Seeking employment.

   a. Invitee—*St. Louis R. Co.* v. *Wirbel*, 104 Ark. 236, 149 S.W. 92 (1912) (An industrial plant, no invitation)

   b. Licensee—*Amer. Ry. Express Co.* v. *Gilbreath*, 48 F.2d 809 (C.C.A. 6th Cir. 1931) (No invitation, told to go to back of building to see person in charge of hiring.)

8. The social guest.

   a. Of the Occupier-Licensee—*Roth* v. *Prudential Life Ins. Co. of N.Y.*, 266 App. Div. 872, 42 N.Y.S. 2d 592 (2d Dept. 1943)
   Wilder v. *Ayers*, 2 App. Div. 2d 354, 156 N.Y.S. 2d 85 (1st Dept. 1956) affd. 3 N.Y. 2d 725

   b. Of the tenant—invitee of the occupier-owner. *Bowers* v. *City Bank Farmers Trust Co.*, 282 N.Y. 442 (1940)

   c. Of the host—treated as class in themselves: licensee—*Scheibel* v. *Lipton*, 156 Ohio St. 308, 102 N.E. 2d 453 (1951)

   d. Business acquaintance invited to private home for supper—invitee of host—*Graber* v. *Grant Printing Corp.*, 26 N.Y.S. 2d 990

   e. Implicitly treated as invitee of host—*Bogateroff* v. *Caplan*, 108 N.Y.S. 2d 205 (Sup. Ct. 1951) affd. 279 App. Div. 1357 (1st Dept. 1952)

f. Employee of tenant in two family house—invitee of landlord-owner—*Clapper* v. *Zubres*, 261 App. Div. 850, 24 N.Y.S. 2d 377 (3d Dept. 1941)

9. Policemen and firemen.

a. Licensee—*Pincock* v. *McCoy*, 48 Idaho 227, 281 P. 371 (1929) (Policeman) *Todd* v. *Armour & Co.*, 44 Ga. App. 609, 162 S.E. 394 (1932) (fireman) *McDaniel* v. *The Lisholt*, 155 F. Supp. 619 (S.D.N.Y. 1957), affd. 2 Cir. July 10, 1958, F.2d (fireman)

b. Occupier has duty of reasonable care to make passageways safe (invitee)—*Bredenhender* v. *Midtown Properties Inc.*, 4 App. Div. 2d 276, 164 N.Y.S. 2d 276 (1st Dept. 1957) *Meiers* v. *Fred Koch Brewery*, 229 N.Y. 10 (1920)

c. City fireman invitee when goes out of area to put out fire on request of owner—*Buckeye Cotton Oil Co.* v. *Campagna*, 146 Tenn. 389, 242 S.W. 646 (Sup. Ct. 1922)

B. Divergent Classifications of Licensees

1. Three Categories: Licensee by express invitation; licensee by implied invitation; and, bare licensee—*Chic. Gr. Western Ry. Co.* v. *Beecher*, 150 F.2d 394 (C.C.A. 8th) cert. den. 326 U.S. 781 (Iowa law)

2. Two categories;

a. Licensee by invitation and licensee by permission —*Millspaugh* v. *Northern Indiana Pub. Serv. Co.*, 104 Ind. App. 540, 12 N.E. 2d 396 (1938)

b. Bare licensee and licensee by invitation—*Firfer* v. *United States*, 208 F.2d 524 (D.C. Cir. 1953) (Federal Tort Claims Act)

3. One Category—Gratuitous licensee: any person lawfully on premises, other than a business visitor—*Oettinger* v. *Stewart*, 24 Cal. 2d 133, 136, 148 P.2d 19 (1944)

C. Standard of Care owed to a Licensee.

1. Different standards of care owed to a licensee in New York.

   a. Intentional or wanton injury—*Fox* v. *Warner-Quinlan Asphalt Co.*, 204 N.Y. 240, 245 (1912) (To refrain from "intentional or wanton injury and from setting dangerous devices for the purpose of harming trespassers.") *Mendelowitz* v. *Neisner*, 258 N.Y. 181, 184 (1932) ("Toward mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional, wanton or wilful injuries unless he maintains some hidden engine of destruction • • • ")

   b. Refrain from acts of affirmative negligence—*Paquet* v. *Barker*, 250 App. Div. 771, 293 N.Y.S. 983 (2d Dept. 1937) ("If he was a bare licensee, • • • the appellant owed the duty of refraining from affirmative acts of negligence that might injure the former.") *Byrne* v. *N.Y. Central & H.R. Ry. Co.*, 104 N.Y. 362 (1887) (Active negligence distinguished from mere passive negligence). See, *Constantino* v. *Watson Contracting Co.*, 219 N.Y. 443, 445-446 (1916) (New York law recognizes "a distinction • • • between the consequences of active and passive negligence.")

2. Objective or subjective standard of whether occupier should have known the condition was unreasonably dangerous to a licensee—New York law—

   a. Subjective standard—*Higgins* v. *Mason*, 255 N.Y. 104, 111 (1930) (Action by guests in auto against owner-operator for injuries caused by defective mechanism. "if Mason's failure to realize that the 'something' which was wrong with the automobile constituted a dangerous condition was due to his lack of mechanical knowledge, that was a

risk assumed by the guests when they accepted the invitation to take the trip".)

b. Objective standard—*Ehret* v. *Village of Scarsdale*, 269 N.Y. 198, 207 (1935) ("In this case it is plain that by the exercise of reasonable vigilance, the defendant might have anticipated that gas might leak from a break in the injured gas main at the point where it was encased in the pipe drain * * * .") *Mayer* v. *Temple Properties*, 307 N.Y. 559, 563-64 (1954)

3. Time when affirmative negligence takes place to impose liability on occupier to licensee under New York law.

a. At any time as long as negligence is affirmative or active in nature—*Meek* v. *Corbisello*, 266 App. Div. 1044, 44 N.Y.S. 2d 529 (3d Dept. 1943) app. den. 267 App. Div. 841; *Mayer* v. *Temple Properties*, 307 N.Y. 559 (1954); *Friedman* v. *Berkowitz*, 206 Misc. 889, 136 N.Y.S. 2d 81 (City Ct. 1954)

b. Only while the licensee is on the premises—*Faber* v. *Meiler*, 278 App. Div. 849, 104 N.Y.S. 2d 485 (2d Dept. 1951)

4. Fall down unlighted steps by licensee.

a. Occupier liable—*Gleason* v. *Academy of the Holy Cross*, 168 F.2d 561 (D.C. Cir. 1948) ("Dangers that reasonably careful people are likely not to discover are latent or hidden.")

b. Occupier not liable—*Biggs* v. *Bear*, 320 Ill. App. 597, 51 N.E. 2d 799 (1943)

5. Injury to licensee caused by excavation on occupier's land.

a. Occupier liable—*Morrison* v. *Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914)

b. Occupier not liable—*Porchey* v. *Kelling*, 353 Mo. 1034, 185 S.W. 2d 820 (1945)

6. Injury to licensee caused by obstruction placed on land by defendant-occupier.

   a. Occupier liable—*Masek* v. *Bubenheimer*, 229 Wisc. 194, 281 N.W. 924 (1938) (Top of iron pipe extending above grass)

   b. Occupier not liable—*Mazey* v. *Loveland*, 133 Minn. 210, 158 N.W. 44 (1916) (Wire stretched across lawn)

7. Whether darkness of night, concealing a dangerous condition which otherwise the licensee would have observed, renders the condition a hidden peril so as to make the occupier liable to a licensee?

   a. Occupier liable—*Vaughan* v. *Transit Development Co.*, 222 N.Y. 79, 84 (1917) (dictum)

   b. Occupier not liable—*Reardon* v. *Thompson*, 149 Mass. 267, 21 N.E. 369 (1889)